



Zoning Board of Appeals– Town of Spencer

Minutes

Zoning Board of Appeals

Tuesday, March 10, 2009

McCourt Social Hall

Memorial Town Hall

The Meeting was called to order at 7:18 p.m.

Zoning Board of Appeals Members Present: Chair Joanne Backus, Allan Collette, Pamela Crawford, Dee Kresco and Albert Drexler (alternate).

Zoning Board Member Absent: None

Staff present: Adam Gaudette, ODIS Director and Bea Meechan, Senior Clerk, ODIS

Old Business:

A. Continuation of Public Hearing – Edward Thibault, 89 North Spencer Road, Spencer, MA. *Chair Backus and Mr. Drexler recused themselves from the hearing.* Therefore, Mr. Collette is acting as the Chairman and Ms. Crawford is as acting Clerk. **Mr. Collette opened the public hearing at 7:18 p.m.**

Mr. Collette stated that tonight's hearing was continued from the hearing on February 24, 2009. The Board had decided to seek more time to review additional information regarding this case; letters (cease and desist) from the previous Building Inspector and documents submitted by the abutters.

Mr. Collette specified that the Board had reviewed the cease and desist letter issued by Mr. Morra (previous Building Inspector), dated 4-17-08. In the letter Mr. Morra acknowledged that the applicant has a legal pre-existing nonconforming use, however he deemed the screening operation was an expansion to that use, and would only be permitted by a special permit. In reference to the tax assessment, the tax bills show only a portion of the land is classified as 61A. Any further tax assessment issue should be addressed with the Town Assessor.

Mr. Collette announced the members sitting in the voting are; Pam Crawford, Dee Kresco and himself.

At this time the applicant, Mr. Thibault, presented support letters from his neighbors and municipal officials to the Board.

Mr. Collette opened the Board for questions and comments.

Mr. Collette asked Mr. Thibault about the hours and number of days per week he operates his business.

Mr. Thibault replied that hours are 7:00 a.m. to 5:00 p.m., and he operates Monday through Friday. As for the screening operation, he does it about 10 days per year.

In referencing Mr. Morra's letter, which indicated "moving or increasing **storage areas** into the required buffer zones," and "must move **materials and equipment** out of the buffer area." Ms. Crawford asked for clarifications on the storage area, material and equipment; have they been moved out from the buffer area since?

Mr. Thibault said the storage areas were the stockpiles and the material was loam. There were manholes stored along the boundary; this could be what he meant as equipment. He stated that they were already been moved away from the buffer zone.

Ms. Kresco asked Mr. Thibault to specify the location of the tree line; whether or not the tree line is along with the property line.

Mr. Thibault replied that the tree line is right on the property line.

Mr. Collette then opened the hearing to the public.

Attorney Jonathan Finkelstein represented the abutter, Ron Sciascia. He presented the Board his '*brief in opposition to the petition for special permit.*' Based on the testimonies given in the previous hearing (2-24-09), he determined that the use was an illegal use when the business was established. In addition, the cease and desist letter explicitly indicated that the screening operation was not permitted and would need a special permit. Mr. Finkelstein then made the following argumentations:

First: To determine the nonconforming use, in terms of the original and the validation of the use. Mr. Finkelstein said that that Mr. Thibault's business is an excavation business and has a Construction Trade Business Use. He stored excavation equipment and vehicles on his property. Mr. Thibault also testified that he had been doing screening business for 25 years.

Mr. Finkelstein asked whether the original use was a nonconforming Construction Trade Business use or nonconforming loam screening business use.

Second: If Mr. Thibault has a valid nonconforming Construction Trade Business use, next to determine whether the expansion is valid or not. The expansion must be of the same nature and purpose as the exiting nonconforming use. Furthermore the expansion may not have a different quality or character than the existing use.

Mr. Finkelstein said that a loam screening use and its operation isn't the same as the storage of construction vehicles. Thus a loam screening business use will be a change to the existing use.

Third: For a Construction Trade Business use, the storage of equipment and vehicle are allowed, providing that they (equipment & vehicles) are located in a distance of 100-feet from any lot line and 300-feet from any existing building. The area between the abutting property and storage should be vegetated (with either natural vegetation or landscaped buffer). *Also, a Site Plan Review is needed under the current Spencer Zoning Bylaw, Section 7.4.*

Mr. Finkelstein said that the Site Plan Review is required to ensure that the use and structure are in compliance with the Bylaw, and not pose any impact to the health, safety and abutting property. Mr. Thibault hasn't yet submitted such application (site plan review).

In addition, the expansion will be more detrimental than the existing nonconforming use to the neighborhood as testified by the abutter, Ron Sciascia; more activities, more noises and more traffic. The proposed use isn't in harmony with the general purpose and intent of the Spencer Zoning Bylaw, said Mr. Finkelstein.

With the above arguments and the referencing to State Zoning Law (MGL, Chapter 40A) and Spencer Zoning Bylaw, Mr. Finkelstein concluded that in this case the use (Construction Trade Business Use) can't be expanded to the loam screening business.

Mr. Gaudette addressed that it was Mr. Morra's opinion at that time when he issued the letter. However, Mr. Thibault contradicted that; he has given testimony that indicates the screening operation has been there ever since the existence of the business.

Mr. Collette clarified that Mr. Thibault does have a pre-existing nonconforming use and is considered grandfathered. In both previous hearings (1-27-09 and 2-24-09), Mr. Thibault gave testimony that he had been doing the screening since the business was established. The loam screening is incidental to the business. Mr. Thibault doesn't do it as a separate business. Mr. Collette then asked Mr. Thibault if he ever advertised the loam business - put sign up in the property and etc.

Mr. Thibault replied that he had never advertised the loam business - put a sign up for selling loam and such.

James Sadusky of 100 North Spencer Road said that he has been residing at the address for 30 years and Mr. Thibault is his neighbor. He commented that Mr. Sciascia must have known of the business prior moving to his current residence (95 North Spencer Road). Regarding to the extra noise and traffic, Bond Construction which is located near the area, produces more noise and traffic than Mr. Thibault's business. Mr. Thibault is a good neighbor and always helps people in time of need. There hasn't been any problem or complaints from anyone prior to Mr. Sciascia's arrival. Mr. Thibault has the right to make a living just like everybody else.

Ms. Crawford asked if he had ever seen the screening being operated on Mr. Thibault's property, and if he had, approximately how long ago.

Mr. Sadusky responded that he had seen such activities, probably longer than 10 years ago, or so.

Aimee Randall of 89A North Spencer Road said she is Mr. Thibault's niece. She said that she has grown up at the address and still lives there. She testified that Bond Construction's equipment create more noise than Mr. Thibault's screening equipment. In addition, there is more traffic volume from Bond Construction than from Mr. Thibault's property. She commented that Mr. Thibault had helped Mr. Sciascia when he had a drainage problem, and he (Mr. Sciascia) had no issue using the screened loam then.

Ron Sciascia of 95 North Spencer Road stated that he has no intention to force any one out of the business. The problem occurred as the operation/equipment was moved closer to his property. His family had to endure the noises; day and night, seven days a week. The noises became overwhelming and unbearable to him and his family.

Mr. Collette needed a clarification on the noises and the period the noises occurred. He then asked whether the noises were from the screening operation or from the trucks (during day and night, and seven days a week). Is he implying that Mr. Thibault operates the screening process at night?

Mr. Sciascia replied that the noises were from both the screening process and the trucks. The screening process has operated at 7:00 p.m. at night. He indicated that he wasn't the first person who had made a complaint. When he filed a complaint to Town Officials, the situation worsened. The beeping noises (from the trucks) were ruthless.

In response, Mr. Thibault said that he had not screened day and night. The statement Mr. Sciascia made wasn't valid. Furthermore, of all neighbors, Mr. Sciascia was the only one who complained.

Mr. Finkelstein said that the screening of loam is about 500 yards per year as stated by Mr. Thibault. Mr. Finkelstein then inquired about the number of trips that will be generated by the trucks (per day, week, month, year) along with the number of hours of the screening business. In addition, the distance from the storage area and the vegetation buffer (discussed previously) should be identified. He thought it is a legitimate question and comment: The business is in the RR district and should have some consideration to people who reside in the area.

The following were additional questions and comments from the Board to Mr. Thibault:

- How long does it take to screen one yard of loam?
Mr. Thibault said in average it takes about an hour to screen 25 yards of loam.
- What is the basic use of the loam (500 yards per year) that is screened?

It is used for filling grave sites, streets for town municipalities, and other jobs he may have.

- Can you screen the extra loam at the jobsites before bringing it back to store at your property?
Most of the time only a small amount of extra loam is left, and it isn't cost-effective to bring the screener to the site for such a small amount.
- When did you purchase the first screener, and was it a portable-unit?
The first one was purchased in the early 1980's and it was not portable unit. The second screener was purchased in 1994 and was a portable unit.

Mr. Finkelstein asked whether the Board sought advice from the Town Counsel as indicated in the previous hearing (2-24-09). Will the Board consider requiring a site plan from Mr. Thibault? How would the Board know everything (storage area and buffer) is in compliance with the regulations?

Mr. Collette said that after reviewing Mr. Morra's letter, he then decided it wasn't necessary to contact Town Counsel. As for a site plan submittal, the Board hasn't determined just yet. The question is whether the screening operation is incidental to the existing use, said Mr. Collette.

Mr. Finkelstein argued the term "incidental to the use," he didn't agree with Mr. Collette.

Mr. Collette explained that Mr. Thibault has the excavation business, and with that he has various trucks, various operations; the screening operation isn't the main business, it is considered incidental to his business.

Albert Drexler of 14 Oak Lane asked if a structure could be constructed and serve as a "sound barrier" to reduce the noise (from a screening operation) to minimize the impact to the abutter.

Richard Monette of 133 Wilson Street commented that first it isn't practical for a business point-of-view and with the current economy to use the screener to screen only a few yards of loam – referring to the above question from the Board. Secondly, if you require the sound barrier being constructed to filter the noise does everything else that operates and makes noise such as lawn-mower, wood-chipper, power tractor and the like be subjected to the same. Mr. Thibault is just doing a small scale business to support his family; he doesn't do a manufacturing-type of business.

Note: No additional comments or questions from the Board and public were raised at this time.

Ms. Crawford made a motion to close the public hearing. Ms. Kresco seconded the motion and the vote was 3-0 in favor.

Ms. Crawford made a motion to grant the special permit for Edward Thibault to extend the current Construction Trade use which is currently legally, pre-existing non-conforming, to allow for the screening and processing of loam and fill at 89 North Spencer Road, Spencer, MA.

Section 4.9.3.C. allows the change or extension of pre-existing nonconforming uses by special permit, when it is not substantially more detrimental to the neighborhood than the existing nonconforming use. Ms. Kresco seconded the motion **and the voting was 3-0**. The following were included in the motion:

Findings: The Board determined that the findings had met the requirement in M.G.L, Chapter 40A, Section 9 and Section 7.2 of the Spencer Zoning Bylaws:

1. That the proposed use is in harmony with the general purpose and intent of the zoning bylaw.
2. That the proposed use will not create undue traffic congestion nor unduly impair pedestrian safety.
3. That the proposed use will not impair the integrity or character of the district or adjoining zones, nor will it be detrimental to the health, safety, or welfare of the neighborhood or the Town.

In addition, the Board made the following finding in accordance with M.G.L. Chapter 40A, Section 6 and Section 4.9.3.C. of the Spencer Zoning Bylaws:

1. That the proposed extension or change is not substantially more detrimental to the neighborhood than the existing nonconforming use.

The approval is granted with the following ***conditions:***

1. That the screening operation shall be an adjunct to the existing Construction Trade Business and shall not serve as a separate enterprise such as for the retail sale of material.
2. That the screening operation will not result in the processing of more than a total of 500 yards of material during any calendar year.
3. That the hours of operation for screening material are restricted to 8 am to 5 pm, Monday through Friday.
4. That prior to the commencement of the screening operation, all existing material shall be relocated to a distance of at least 100 feet from any property line.
5. That the screening operation shall be conducted a minimum 200 feet from any property line and be conducted at least 300 feet from any existing, abutting residential structure.

6. That the operation shall be buffered from abutting properties with stockpiled material at least 15 feet in height and located at least 100 feet from any property line. The applicant is required to schedule a site visit with the Spencer Wetlands/Soil Specialist prior to constructing the stock pile barriers to ensure proper erosion control measures are established and that down-gradient impacts are prevented. Once the stockpiles have been constructed, a second site visit shall be scheduled to ensure proper construction and then if deemed satisfactory by the Wetland Soil/Specialist, the applicant shall be authorized to conduct the screening activity.
7. That the applicant shall be subject to an annual review by the Zoning Board of Appeals to ensure compliance with all of the above conditions.

Mr. Gaudette explained that once the decision has been filed with the Town Clerk, staff from ODIS will mail the copy of the decision along with instructions to the applicant, and also to all abutters.

Approval of Minutes: For February 24, 2009

Ms. Crawford made a motion to accept the minutes for February 24, 2009. Ms. Kresco seconded the motion and the vote was 3-0 in favor.

New Business: None

Other Business: None

Ms. Crawford made a motion to adjourn the meeting at 8:30 p.m. Ms. Kresco seconded the motion and the vote was 3-0 in favor.

Submitted By:

Bea Meechan, Senior Clerk, ODIS